

United States
Circuit Court of Appeals

For the Ninth Circuit.

SOCIETA ITALIANA di MUTUA BENEFI-
CENZA, a Corporation,

Appellant,

vs.

R. A. BURR, as Trustee in bankruptcy of the estate
of Giovanni B. Nave, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

FILED

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PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES OF ATTORNEYS:

For Societa Italiana di Mutua Beneficenza, Appellant:

BACIGALUPI, ELKUS & SALINGER, Esqs.,
485 California St.,
San Francisco, Calif.

For A. W. Higgins, Trustee, and Appellee:

TORREGANO & STARK, Esqs.,
Mills Building,
San Francisco, California.

In the Southern Division of the United States
District Court for the Northern District of
California. Second Division.

No. 19998-K.

In the Matter
of

GIOVANNI B. NAVE, individually and as stockholder of ENAMELED PORCELAIN PRODUCTS COMPANY, a corporation,
Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE.

To the Honorable T. J. Sheridan, Referee in Bankruptcy:

The petition of A. W. HIGGINS respectfully shows and alleges:

That he is the duly elected, qualified and acting Trustee in Bankruptcy herein;

That the petition praying that said bankrupt be so adjudicated was filed on the 20th day of November, 1930, and thereafter, to-wit, on the 21st day of November, 1930, said bankrupt was duly adjudicated; that at the time of the filing of the petition and adjudication the said bankrupt was in possession of certain real property as a tenant from month to month of certain property, consisting of an eight-acre tract adjoining a cemetery near Colma, in the County of San Mateo, State of California; said property was owned by Societa Italiana Di Mutua Beneficenza; that at the time of the filing of the petition in bankruptcy there was growing a crop of vegetables on said land, planted and cultivated by said bankrupt, the value of which, by stipulation between your petitioner and said Societa Italiana Di Mutua Beneficenza, has been set at the sum of Four Hundred (\$400.00) Dollars; that the payment of said sum of \$400.00 has been guaranteed to your petitioner by said Societa Italiana Di Mutua Beneficenza upon a determination of the rights of the Trustee in and to said vegetables; that your petitioner alleges that with the filing of the petition in bankruptcy all the right, title and [1*] interest of said bankrupt in and to said vegetables, which was absolute at said date, passed to your petitioner, and ever since then your petitioner has been the owner thereof and is entitled to the possession of said vegetables for the purpose of removing same from said land, or the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

sum guaranteed in payment thereof by stipulation.

Your petitioner further alleges that the said bankrupt was the owner of a pump and 10 H. P. motor, alleged to be of the value of Seven Hundred Fifty (\$750.00) Dollars which were located on said premises said pump and motor being severable and removable from said premises as being part of the equipment belonging to said bankrupt; that some right, title and interest in and to said crop of vegetables and said pump and 10 H. P. motor has been asserted by the said Societa Italiana Di Mutua Beneficenza.

WHEREFORE, your petitioner prays for an order to show cause directed to Societa Italiana Di Mutua Beneficenza to show cause, if any they have, at a time and place certain to be hereafter set, why the title to said vegetables or the sum of money representing same should not be declared to be free and clear of any claim of said Societa Italiana Di Mutua Beneficenza, and to show cause, if and they have, at said time and place, why the title of your petitioner in and to said pump and 10 H. P. motor should not be declared free and clear of any claim of said Societa Italiana Di Mutua Beneficenza, and for such other and proper relief as may be meet in the premises.

A. W. HIGGINS,
Petitioner.

TORREGANO & STARK
By Charles M. Stark
Attorneys for Petitioner. [2]

Northern District of California,
City and County of San Francisco.—ss.

A. W. Higgins, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing petition; that he has read said petition, knows the contents thereof and hereby makes solemn oath that the statements therein contained are true, according to the best of his knowledge, information and belief.

A. W. HIGGINS.

Subscribed and sworn to before me this 26 day of January, 1931.

T. J. SHERIDAN,
Referee in Bankruptcy.

[Endorsed]: Filed Jan. 26, 1931, at 10 o'clock and 30 Min. A. M. T. J. Sheridan, Referee in Bankruptcy. [3]

[Title of Court and Cause.]

ANSWER OF SOCIETA ITALIANA DI
MUTUA BENEFICENZA ON ORDER
TO SHOW CAUSE.

To the Honorable T. J. Sheridan, Referee in Bankruptcy:

Now comes Societa Italiana di Mutua Beneficenza and appearing as defendant herein and by way of Answer to the Petition of A. W. Higgins, Esq., admits, denies and alleges:

I.

Defendant admits all of the allegations contained in the first and second paragraphs of the Petition for Order to Show Cause filed herein, save and excepting the allegation that on the 21st day of November, 1930, the said bankrupt "was in possession of certain real property as a tenant from month to month" and in this connection defendant alleges that at all times from and after the 16th day of October, 1930, said Giovanni B. Nave was unlawfully in possession of said premises and defendant further denies that petitioner is or ever has been the owner of the vegetables or is or ever has been entitled to the possession of said vegetables or to the said sum of Four Hundred (\$400.00) Dollars.

II.

Defendant denies that on the 20th day of November, 1930, or at any time thereafter that said bankrupt was the owner of the said pump and 10 H. P. Motor referred to in the Petition heretofore filed herein and in this connection denies that said pump and motor are of a value of Seven Hundred and Fifty (\$750.00) Dollars, and defendant alleges that said pump and motor are of no greater value than the sum of Twenty-five (\$25.00) dollars and defendant further alleges that said pump and motor are attached to and are a part of said premises referred to in the said petition.

III.

Defendant alleges that prior to the 1st day of June, 1930, that said defendant leased, demised and let the said [4] premises to said G. B. Nave at the monthly rental of Ninety-five (\$95.00) Dollars per month, payable monthly, on the 1st day of each and every month thereafter in advance, and said G. B. Nave promised and agreed to pay said rental to said defendant and said G. B. Nave entered into possession and occupation of said leased premises.

IV.

That pursuant to said lease there was and became due on October 1st, 1930, from said G. B. Nave to the defendant herein for the rent of said premises for five (5) months, to-wit, from June 1st to October 31st, 1930, the sum of Four Hundred and Seventy-five (\$475.00) Dollars.

V.

That on the 13th day of October, 1930, defendant herein made demand in writing on said G. B. Nave (pursuant to the provisions of Section 1161, sub-section 2 of the Code of Civil Procedure of the State of California) for and requiring the payment of said rental or the possession of the said premises, but said G. B. Nave neglected and refused for the period of Three (3) full days and upwards after demand so made as aforesaid, and thereafter neglected and refused to pay said rent or surrender possession of said premises.

VI.

That thereafter on the 21st day of November, 1930, defendant herein commenced an action in the Superior Court of the State of California, in and for the County of San Mateo against said G. B. Nave for the possession of said premises in accordance with the provisions of Chapter IV, Title III, Part III of the Code of Civil Procedure of the State of California, and thereafter on the 4th day of December, 1930, defendant herein recovered judgment in said action in the Superior Court of the State of California, in and for the County of San Mateo, wherein and whereby it was adjudged and decreed that defendant herein was entitled to [5] the possession of said premises and said judgment was duly entered and filed and docketed in the office of the County Clerk of the County of San Mateo on the 4th day of December, 1930, and said judgment is still in full force and effect.

WHEREFORE defendant prays that it be adjudged that petitioner herein has no right, title or interest in or to the said property referred to herein or the said sum of Four Hundred (\$400.00) Dollars.

BACIGALUPI, ELKUS & SALINGER,
Attorneys for Defendant, Societa Italiana
di Mutua Beneficenza.

State of California,
City and County of San Francisco.—ss.

J. Civinini, being first duly sworn, deposes and says: That he is the secretary of Societa Italiana di Mutua Beneficenza, and as such officer is duly authorized to make this affidavit for and on behalf of said association; that he has read the foregoing answer and knows the contents thereof and that the same are true of his own knowledge, except as to those matters therein stated on information and belief and that as to those matters he believes it to be true.

J. CIVININI.

Subscribed and sworn to before me this 27th day of January, 1931.

[Seal] RAY SOPHIE FEDER,
Notary Public in and for the ity and County of
San Francisco, State of California.

[Endorsed]: Receipt of copy acknowledged Jan. 27, 1931.

TORREGANO & STARK,
Atty. for Petitioner.

Filed Jan. 27, 1931, at 10 o'clock and Min.
A. M.

T. J. SHERIDAN,
Referee in Bankruptcy. [6]

[Title of Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER.

To T. J. Sheridan, Esq., Referee in Bankruptcy:—

Your petitioner respectfully shows:

That your petitioner, SOCIETA ITALIANA DI MUTUA BENEFICENZA is the defendant and respondent to a petition for order to show cause filed by A. W. Higgins, Esq., as Trustee for the above named bankrupt, said petition having been filed by said Trustee for the purpose of determining the claim of said Trustee to a certain growing crop of vegetables, and also the alleged title of the said Trustee to a certain pump and 10 H. P. motor, the said Trustee in said petition having alleged that said growing crop of vegetables and said pump and motor being part of the assets of the estate of said G. B. Nave, Bankrupt.

That your petitioner herein, Societa Italiana di Mutua Beneficenza, made answer to the said petition of said Trustee and denied the said claim of said Trustee and alleged that said Societa Italiana di Mutua Beneficenza was the owner of said property. The matter was then heard before you as Referee and evidence was introduced, both oral and documentary, and the matter submitted for decision. [7]

That on the 3rd day of September, 1931, an order, a copy of which is hereto annexed, was made and entered herein and your petitioner received notice

of said order on the 5th day of September, 1931, and that by the terms of said order the hereinabove mentioned petition of A. W. Higgins, as Trustee, was thereby granted.

That your petitioner respectfully represents that such order was and is erroneous in that said order is contrary to the law and the facts in that there is no evidence in the cause that shows that said Trustee, or the said bankrupt, was or is entitled to the ownership of said growing vegetables, or the proceeds thereof, or is or was entitled to the ownership of said pump and 10 H. P. motor.

That said order is contrary to the law and the facts in that the evidence in the cause shows that your petitioner herein, Societa Italiana di Mutua Beneficenza, was and is the owner of the real property on which said vegetables were growing and that the said pump and said 10 H. P. motor were affixed and attached to said premises and that said premises were owned by your said petitioner. That said order is unsupported by the evidence.

WHEREFORE, your petitioner feeling aggrieved because of such order prays that the same be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated: September 10th, 1931.

SOCIETA ITALIANA DI MUTUA
BENEFICENZA,

Petitioner.

BACIGALUPI, ELKUS & SALINGER,
Attorneys for Petitioner. [8]

State of California,
City and County of San Francisco.—ss.

J. Civinini, being duly sworn, deposes and says:

That he is the Secretary of SOCIETA ITALIANA DI MUTUA BENEFICENZA, and as such officer is duly authorized to make this verification on behalf of said corporation; that he has read the within petition and knows the contents thereof and all the statements of fact therein contained are true according to his own knowledge.

J. CIVININI.

Subscribed and sworn to before me, this 10th day of September, 1931.

[Notarial Seal] RAY SOPHIE FEDER,
Notary Public in and for the City and County of
San Francisco, State of California. [9]

[Title of Court and Cause.]

ORDER ALLOWING PETITION OF TRUSTEE

The petition of the Trustee in the above-entitled proceeding came on regularly to be heard on the 27th day of January, 1931, Messrs. Torregano & Stark, by C. M. Stark, appearing for petitioner and Trustee, and Messrs. Bacigalupi, Elkus and Salinger appearing for Respondent Societa Italiana Di Mutua Beneficenza. Testimony was received and the matter submitted upon briefs of counsel, and now upon consideration thereof,

IT IS ORDERED that the petition of the Trustee herein be granted and that the Respondent Societa Italiana Di Mutua Beneficenza be required to pay to the Trustee forthwith the sum of Four Hundred Dollars (\$400.00) as the amount agreed to be paid for certain vegetables in the order of the Referee in the above-entitled matter, made January 3, 1931, confirming the sale thereof, and

IT IS FURTHER ORDERED that the said Respondent Societa Italiana Di Mutua Beneficenza has no right, title, interest or claim in or to the certain pump and 10 H. P. motor, referred to in the petition.

Dated: September 3, 1931.

T. J. SHERIDAN,
Referee in Bankruptcy.

[Endorsed]: Receipt of copy of within Petition Acknowledged September 10, 1931.

TORREGANO & STARK,
Attorneys for Trustee.

Filed Sep. 10, 1931 at 2 o'clock and 30 min. p. m.

T. J. SHERIDAN,
Referee in Bankruptcy. [10]

[Title of Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW.

To the Honorable the United States District Court
for the Northern District of California, the
Honorable Frank H. Kerrigan, Judge:

The undersigned Referee in Bankruptcy, to whom the administration of the estate of the above named bankrupt stands referred, pursuant to the provisions of General Order in Bankruptcy XXVII, respectfully certifies to the Judge of the above entitled court the following controversy:

Immediately following the election and qualification of the Trustee in Bankruptcy, he filed with me his petition for an order to show cause directed to Societa Italiana Di Mutua Beneficenza to show cause before me, if any they had, why the Trustee's title to certain growing vegetables alleged to comprise a part of the estate of the above named bankrupt should not be declared free and clear of any claim of said Societa Italiana Di Mutua Beneficenza, and to further show cause, if any they had, why the title to the Trustee in and to a certain 10 H. P. motor and pump should not be declared free and clear of any claim of said Societa Italiana Di Mutua Beneficenza. The order to show cause was issued pursuant to the petition of the Trustee and, upon notice to the parties, came on for hearing before me in due course. It was undisputed between the parties that the said bankrupt had for a long time prior to the filing of his petition in bankruptcy been an occupant of certain real prop-

erty in South San Francisco owned by said Societa Italiana Di Mutua Beneficenze; that his original occupancy of the land had been pursuant to the terms of a lease between him and Societa Italiana Di Mutua Beneficenza which ran for a term of five (5) years, in other words, from April 2, 1925 to the 2nd day of April, 1930, and thereafter the said bankrupt had occupied the land under a provision of the lease that permitted him to hold over on a month to month basis. Holding over on this [11] month to month basis, the bankrupt had planted a crop of vegetables on the land comprising cauliflower, cabbage, beets, carrots, parsnips, spinach, turnips and onions and at the time of his bankrupt these vegetables were in a condition ready for harvest. The bankrupt, however, had not made his payments as rental on the property as agreed above, and on October 13th, 1930, Societa Italian Di Mutua Beneficenza caused to be served upon Nave a notice to quit, pursuant to Section 1161 of the Code of Civil Procedure of California. On November 20th, 1930, Nave filed his petition in bankrupt and on November 21st, 1930, was adjudicated a bankrupt. On the same day, respondent started an action in the State Courts of Unlawful Detainer against Nave, seeking to have him ejected from the land. The sole question presented as far as the vegetables are concerned, is as follows: Is a notice to quit under the provisions of Section 1161 of the Code of Civil Procedure sufficient to deprive the right of a tenant from month to month to take from the land a crop growing thereon, which was planted by him, cultivated

by him and which was ready for harvest at the time the notice to quit was given? The respondents assert that ipso facto with the giving of the notice to quit, all the right, title and interest of Nave in the growing crop of vegetables was foreclosed, and cite in support of this contention the case of *Agoure v. Plumber*, 175 Cal. 543, *Wickstrom v. McGrath*, 261 Pac. 326, that a tenant who holds the property after the three-day notice to quit has expired is not in lawful possession of the premises. Admitting this statement of the law to be true, I have held that the notice given to Nave did not deprive him of the right to move the vegetables by reason of the fact that his holding falls within the exception to the general rule; it having been held that an exception to the limitation upon the right of tenants to take emblements from the property after the notice to quit is made by the common law rule giving the tenant the right [12] to take the emblements after the termination of the lease when it cannot be known when the tenant's tenure will terminate. Nave could not have known when the landlord would elect to deprive him of the further use of the land and the landlord having permitted him to plant on the land a seasonal crop, could not deprive him of his rights to this crop by exercising his right to oust the tenant just as the crop was coming on to maturity.

Sullivan v. Superior Court, 185 Cal. 133;

Hart v. Fuller Company, 45 Cal. App. 618.

In other words, the landlord permitted Nave to

plant his crop after the termination of the lease for a fixed term of years and permitted him to keep the property from April until October during the growing of the crop so planted. It was impossible for Nave to have known when the landlord would exercise the right to terminate the tenancy at will, and when the will of the landlord was exercised, Nave had the right to remove his crop.

The case of *Agoure v. Plumber* cited by *Societa Italiana Di Mutua Beneficenza* in support of its contention that it was entitled to the crop upon the giving of the notice to quit does not apply here, for the instant case falls within the common law exception to the rule of *Agoure v. Plumber*. In that case the lease was for a fixed term of years and the tenant planted his crop with the knowledge that his term would expire before the crop would mature. Further, under the express provisions of Section 819 of the Civil Code, Nave was entitled to remove the annual products of the soil, his holding after the termination of his lease having been with the consent of the landlord. Section 819 of the Civil Code says:

“A tenant for years or at will, (as Nave was) unless he is a wrongdoer by holding over, may occupy the buildings, *take the annual products of the soil*, work mines and quarries open at the commencement of his tenancy.”

Blaeholder v. Guthrie, 17 Cal. App. 297. [13]

The next question presented on this review is as to whether or not Societa Italiana Di Mutua Beneficenza may claim a pump and motor located on the premises by reason of the election of the landlord to terminate the tenancy at will.

The evidence shows that it was admitted by the landlord that the pumping equipment in question belonged to Nave (Trans. p. 4). If the pumping equipment was not a fixture, and I find from the evidence that it was not but was removable, it would follow that the giving of the notice to quit could deprive Nave of no rights so far as the removal of his tangible property from the premises is concerned. It would be as well to state that after giving a notice to quit, a tenant is deprived of his rights to drive his cattle from the property. Such a contention, of course, cannot be sustained.

Nave having the right to remove his annual crop of vegetables notwithstanding the notice to quit, and in addition having the right to remove his pumping equipment from the premises, it follows that his Trustee in Bankruptcy has the same right. I held therefore that Societa Italiana Di Mutua Beneficenza had no right, title and interest in or to, or claim upon, the crop of vegetables growing upon the land at the time of the filing of the petition in bankruptcy. I held in addition that Nave had the right to remove his farming equipment, including the pump and 10 H. P. motor. It follows that the Trustee had the same right and that Societa Italiani Di Mutua Beneficenza have no right, title

and interest in or to, or claim upon, the pumping equipment.

An order was prepared and filed in the proceeding by me in accordance with the foregoing statements.

Dated: February 27, 1933.

T. J. SHERIDAN,
Referee in Bankruptcy.

There is transmitted for the information of the Court, together with this certificate, the following documents: [14]

1. Petition of the Trustee for an Order to Show Cause.
2. Order to Show Cause.
3. Transcript of Testimony on hearing of Order to Show Cause.
4. Opening Points and Authorities of Societa Italiana Di Mutua Beneficenza.
5. Reply Points and Authorities of the Trustee in Bankruptcy.
6. Closing Points and Authorities of Societa Italiana Di Mutua Beneficenza.

[Endorsed]: Filed Mar. 2, 1933, 12:35 P. M.
Walter B. Maling, Clerk. [15]

District Court of the United States, Northern
District of California, Southern Division.

AT A STATED TERM of the Southern Division
of the United States District Court for the North-
ern District of California, held at the Court Room
thereof, in the City and County of San Francisco,

on Monday, the 27th day of March, in the year of our Lord one thousand nine hundred and thirty-three.

PRESENT: the Honorable FRANK H. KER-RIGAN, Judge.

No. 19998.

IN THE MATTER OF

G. B. NAVE

IN BANKRUPTCY

ORDER CONFIRMING ORDER OF REFEREE.

This matter came on regularly this day for hearing on Certificate of Referee on Petition to Review Order relating to certain growing vegetables. After hearing Attorneys, ordered said matter submitted. After due consideration having been thereon had, IT IS ORDERED that the order of the Referee upon review be and the same is hereby approved and affirmed. [16]

[Title of Court and Cause.]

APPEAL AND ALLOWANCE.

The above named SOCIETA ITALIANA DI MUTUA BENEFICENZA, a corporation, conceiving itself aggrieved by the Order and Decree of the said United States District Court for the Northern District of California, Southern Division, made and entered on the 27th day of March, 1933, deny-

ing their Petition for review and confirming the Order of the Referee of September 3, 1931, in the above entitled matter, which said matter is a controversy arising in bankruptcy in the matter of Giovanni B. Nave, a bankrupt, does hereby appeal from the said Order and Decree of March 27, 1933, to the United States Circuit Court of Appeals, for the Ninth Circuit, and prays that this Appeal be duly allowed and that a transcript of the record and proceedings and papers upon which said Order and Decree were made be duly authenticated and be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, as required by law, upon this said appeal.

Dated: March 30th, 1933.

BACIGALUPI, ELKUS & SALINGER,
GEORGE F. BUCK, JR.,

Attorneys for said Appellant, Societa
Italiana Di Mutua Beneficenza.

ALLOWANCE OF APPEAL.

And now to-wit: On March 30th, 1933, it is ordered, on motion of Appellant that the foregoing Appeal be and it is hereby allowed as prayed for; bond to be given by Appellant in the sum of \$750.00, supersedeas and cost bond in the sum of \$250.00.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Mar. 30, 1933. 9:33 A. M.
Walter B. Maling, Clerk. [17]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

NOW comes SOCIETA ITALIANA DI MUTUA BENEFICENZA, a corporation, the appellant in the above entitled matter and respectfully represents that there is manifest error in the record and proceedings therein, to-wit: in the Order and Decree of the United States District Court for the Northern District of California, made and entered in the said matter on the 27th day of March, 1933, denying Appellant's Petition for Review of the Order of the Referee in Bankruptcy dated September 3, 1931, and confirming the Report, Order, Certificate and Return of the Referee in that connection. That said Order and Decree of March 27, 1933, of the said United States District Court are erroneous in the following particulars, to-wit:

1. In denying the said Petition for Review of the said Order of the Referee and in confirming the Report, Order, Certificate and Return of the Referee.

2. That said Order and Decree are erroneous in that said Order and Decree are contrary to the law and the facts in that there is no evidence in the cause that shows that the said Trustee, or the said Bankrupt was or is entitled to the ownership of the said growing vegetables of the cash proceeds thereof, or is or was entitled to the ownership of said pump and 10 H.P. motor, which said property is referred to in the Order of the Referee.

3. That said Order and Decree are contrary to

the law and the facts in that the evidence in the cause shows, without conflict, that Appellant herein was and is the owner of the said property herein-above referred to.

WHEREFORE, Appellant prays that said Order and Decree of the United States District Court for the Northern District of California, of March 27, 1933, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and [18] Appellant granted such other and further relief as may be just and in conformity with law.

Dated: March 30, 1933.

BACIGALUPI, ELKUS & SALINGER
GEORGE F. BUCK Jr.

Attorneys for Appellant Societa
Italiana di Mutua Beneficenza.

[Endorsed]: Filed Mar 30, 1933 9:33 AM Walter
B. Maling, Clerk [19]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

BE IT REMEMBERED that on the hearing of the above entitled matter before the Honorable Thomas J. Sheridan, Referee in bankruptcy, upon application of the trustee in bankruptcy of the estate of G. B. NAVE, bankrupt, on order to show cause against SOCIETA ITALIAN di MUTUA BENEFICENZA on January 27, 1931, the following testimony was taken.

G. B. NAVE

was called as a witness on behalf of the Trustee, and being first duly sworn testified as follows:—

I occupied the premises of Societa Italiana di Mutua Beneficenza from April 2, 1925 to April 2, 1930 under a lease dated April 2, 1925 between Societa Italiana di Mutua Beneficenza, Lessor, and G. B. Nave, as Lessee.

The Trustee then introduced said lease in evidence as Trustee's Exhibit No. 2.

I resided and remained on the premises until December 15, 1930. During the season of 1930, I planted thereon cauliflower, some cabbage, some beets, and french carrots, some parsnips, some spinach, some white turnips and onions and they were growing in the ground on November 20, 1930. I own the pump and the electric motor on the premises, which have been there for the last seventeen years. The pump and motor were used by me for pumping water from the well on the premises. The motor is attached to the pump. The pump rests on a base of wood and concrete and is bolted on the wood. The bolts can be removed and the pump taken away. There are maybe four or five bolts.

It was stipulated between respective counsel at the hearing that G. B. Nave did not pay the rental on the said [20] premises which fell due June 1, 1930 and that G. B. NAVE was in default on the payment of the rental for a period of five months immediately prior to the adjudication in bankruptcy and that Societa Italiana di Mutua Benefi-

cenza on October 13, 1930 served on G. B. Nave Notice to Quit; said Notice to Quit being Respondent's Exhibit "A".

It was stipulated between counsel at the hearing that the Petition in bankruptcy was filed on November 20, 1930 and G. B. Nave was adjudicated a bankrupt on November 21, 1930 and that on November 21, 1930, subsequent to the adjudication, that a Complaint in Unlawful Detainer was filed by Societa Italiana di Mutua Beneficenza.

The cause was then submitted for decision.

The foregoing Statement of Evidence has been prepared by Appellant pursuant to General Order in Bankruptcy No. 37 and Equity Rule 75.

Respectfully submitted.

BACIGALUPI, ELKUS & SALINGER
GEORGE F. BUCK Jr.

Attorneys for Appellant.

On motion of George F. Buck, Jr., attorney herein, and no objection being made thereto, it is ordered that this statement of evidence heretofore presented herein is settled and allowed.

Dated: June 13th, 1933.

FRANK H. KERRIGAN.

United States District Judge.

[Endorsed]: Filed Jun 14, 1933 10 32 AM
Walter B. Maling, Clerk. [21]

(TRUSTEE'S EXHIBIT NO. 2)

THIS INDENTURE OF LEASE made this 2nd day of April, 1925 by and between SOCIETA ITALIANA di MUTUA BENEFICENZA, a California corporation, hereinafter called the lessor and G. B. NAVE, of the County of San Mateo, State of California, hereinafter called the lessee,

WITNESSETH:

That said lessor does hereby lease unto the said lessee and the said lessee does hire and take from the said lessor that certain eight (8) acre tract adjoining the cemetery owned by said lessor near Colma, County of San Mateo, State of California, together with the six (6) room frame dwelling situate on said parcel of real estate herein demised, for the term of five (5) years from and including the 1st day of April, 1925 to and including the 31st day of March, 1930, at total rental of Fifty Seven Hundred (\$5700.00) Dollars, payable in advance in equal monthly installments of Ninety-Five (\$95.00) Dollars on the first day of each and every month, the first of which said installments becomes due and payable on the 1st day of April, 1925.

Should said lessee hold over the term created herein, then such tenancy shall be from month to month and in all other respects upon the same terms and conditions as herein stated.

The lessee agrees to pay the said rent to the said lessor, its agents or assigns, in the manner hereinabove specified. And it is further agreed that if

the said rent shall be due and unpaid, then it shall be lawful for the lessor its agents or assigns without notice, to re-enter said premises and remove all persons therefrom and the said lessee waives all rights under Sections 1161-1162 of the Code of Civil Procedure of the State of California, and Section 791 of the Civil Code of the State of California.

The lessee agrees not to sell or assign this lease or any part thereof, or any right thereunder or to let or underlet [22] the whole or any part of said premises and the building thereon without the written consent of the lessor first had and obtained. And the lessee further agrees that he will keep the premises free from all nuisances at his own cost and expense and comply with all the requirements of any local ordinances or statutes pertaining to the condition of the said premises.

And the said lessee agrees not to make or suffer to be made any alteration to said building without the written consent of the lessor first had and obtained.

Said lessee agrees not to use said demised premises for any other purpose than that of growing vegetables or flowers and to use the building situate thereon for a dwelling and for no other purpose without the written consent of the lessor first had and obtained.

And the said lessee further agrees to pay for all gas, electric light, and heat that may be used upon said premises during the term of this lease.

Said lessee is hereby given the right to use the

well now upon said demised premises and to pump therefrom all water necessary for use on said demised premises and in this connection said lessee agrees to use his own pumping equipment for said purpose and to pay for all power and electricity used in pumping said water. Said lessor retains the right to pump water from said well to be used on the cemetery lands of said lessor in case the present water supply of said lessor situate on its cemetery lands is not sufficient for its purposes.

The within lease is hereby made upon the express condition that if at any time within said period of five (5) years it became necessary to use said demised premises for cemetery purposes that then and in that case said lessee agrees upon thirty (30) days written notice given by said lessor to said lessee to immediately vacate said demised premises [23] upon the expiration of said notice.

Said lessor hereby retains the right to dump all surplus material from the excavation of graves or vaults in the cemetery belonging to said lessor upon the within demised premises but said lessor agrees to dump said material in such places as may be designated by said lessee.

Said lessee agrees further to maintain all fences existing on said demised premises in good order, condition and repair at his own cost and expense and further agrees to care for and maintain all trees at present growing on said demised premises.

The lessor, or its agents, shall have and they are hereby given the right to enter upon said premises at all reasonable times to inspect the same.

The said lessee hereby covenants, promises and agrees that he will not suffer any lien or incumbrance to come upon his leasehold of the said premises or any part thereof. It is also specially covenanted, agreed and understood that an assignment of this lease or any interest therein by operation of law or otherwise will constitute a breach of the covenant against assignment and shall work a forfeiture.

And the said lessee hereby specifically covenants and agrees that he will keep and maintain all of the demised property and premises in good order, condition and repair during the whole of the term hereby created and make all repairs thereto of every kind and character and description at his own cost and expense and further expressly waives all rights under sections 1941-1942 of the Civil Code of the State of California.

That said lessee agrees that any improvements or additions to the premises herein except movable fixtures, that may be made under the terms of this lease shall be and become at once a part of the realty and belong to the lessor, its successors and assigns. [24]

And the said lessee hereby agrees to keep the premises in good order and in safe condition and to save and keep the lessor free from all loss or liability brought on by injuries to persons or property arising from or occasioned by the conditions of the premises and to meet all loss or liability in that behalf.

Said lessee agrees that in the event that the lessor brings an action at law to enforce any of the terms or conditions herein or the said lessor commences a summary action under the unlawful detainer act, then said lessee agrees to pay the lessor such reasonable attorneys' fees as may be expended or incurred by it in the said action.

In case said lessee shall be in default as to any of the conditions and covenants of this lease and said lessor having knowledge shall not take advantage of the same, this failure shall in no case be construed as a waiver of said conditions or covenants and all said conditions and covenants shall remain in full force and effect unless expressly waived in writing by said lessor.

Time is of the essence of this agreement and of all the terms and conditions herein contained.

This lease shall bind both parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed the day and year first hereinabove written.

[Seal] SOCIETA ITALIAN DI MUTUA
BENEFICENZA

By Felice Castagnola

By J. CIVININI

G. B. NAVE

Corection O. K. F C [25]

San Francisco, California
April 2nd, 1925.

G. B. Nave,
Colma, California.

Dear Sir:

In connection with that certain lease entered into between this Society and yourself, we hereby agree that in case we require any water from the well situate on the premises leased to you that we will pay for all power used while pumping water from our use, and further agree that we will only pump water from said well during the night-time, it being understood that you will allow us to use your pumping equipment.

We further agree that in case it becomes necessary to use any portion of the premises leased to you for cemetery purposes, that we will only take such part as is absolutely necessary for cemetery purposes, and in case any portion of the premises are taken for cemetery purposes the rent shall be abated in proportion to the amount of land taken.

We further agree that in case said building leased from us by you is damaged by fire, earthquake or the elements that you shall not be required to repair the same.

[Seal] SOCIETA ITALIANA DI MUTUA
BENEFICENZA

By Felice Castagnola

Its President

By J. Civinini

Its Secretary.

[Endorsed]: Filed 1/27/31 In re Giovanni B.
Nave, Tr. Exh. 2 T. J. S. Referee [26]

(RESPONDENTS EXHIBIT "A")

MATTER G. B. NAVE

JAN. 27, 1931)

October 13th, 1930.

To G. B. Nave,
Tenant in Possession,
Colma, California.

Demand is hereby made upon you and you are hereby required to pay the rent of that certain eight(8) acre tract adjoining the Italian Cemetery, owned by the undersigned, near Colma, County of San Mateo, State of California, together with the six-room frame building situate thereon, which you are now in possession of, and under the terms of that certain month to month tenancy, wherein SOCIETA ITALIANA DI MUTUA BENEFICENZA, is the Owner, and G. B. NAVE, is tenant amounting to the sum of Four Hundred and Seventy-five (475.00) Dollars, being the amount now due and owing to the undersigned, by you for five (5) months' rent, commencing on the 1st day of June, 1930, and ending on the 31st day of October, 1930, or deliver up possession of the same to the undersigned within three (3) days after the receipt of the within notice, or the undersigned shall institute legal proceedings against you to recover possession of said premises with treble rents.

SOCIETA ITALIANA DI MUTUA
BENEFICENZA

By J. CIVININI

Owner

BACIGALUPI, ELKUS & SALINGER

Attorneys for Owner. [27]

[Title of Court and Cause.]

BOND FOR COSTS

KNOW ALL MEN BY THESE PRESENTS:

That we SOCIETA ITALIANA DI MUTUA BENEFICENZA, a corporation, as Principal and the undersigned individuals, as Sureties, are held and firmly bound unto the above named Trustee in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which well and truly to be made we bind ourselves, our administrators, executors, successors and assigns, jointly and severally, by these presents:

WHEREAS, an order was entered in the above entitled proceeding on the 30th day of March, 1933, allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain order by said United States District Court made on the 27th day of March, 1933, in the above entitled proceeding.

WHEREAS, in said Order allowing said appeal it was required that Appellant give a bond for costs in the sum of Two Hundred Fifty Dollars (\$250.00).

WHEREAS, this recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon mentioned in Rule 34 of the said District Court.

NOW, THEREFORE, the condition of this obligation is such that if the above named SOCIETA

ITALIANA DI MUTUA BENEFICIENZA shall prosecute its appeal to the effect and answer costs if said appellant fails to make said appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

SOCIETA ITALIANA DI
MUTUA BENEFICENZA

(Principal)

By F. Castagnola, President.

J. Civinini

Surety.

Domenico Castagnola

Surety. [28]

State of California

City and County of San Francisco—ss.

J. Civinini and Domenico Castagnola the Sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says.-

That he is a resident and freeholder in the City and County of San Francisco, State of California, and is worth the sum in the undertaking specified as the principal thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. CIVININI

DOMENICO CASTOGNOLA

Subscribed and sworn to before me this 7th day of April, 1933.

[Seal]

JAMES S. MULVEY

Notary Public in and for the City and County of San Francisco, California.

[Endorsed]: Filed Apr. 7, 1933, 2:30 P. M.
Walter B. Maling, Clerk. [29]

[Title of Court and Cause.]

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, SOCIETA ITALIANA DI MUTUA BENEFICENZA, a corporation, as Principal, and the undersigned individuals, as Sureties, are held and firmly bound unto the above named Trustee in the sum of Seven Hundred Fifty Dollars (\$750.00) for the payment of which well and truly to be made we bind ourselves, our administrators, executors, successors and assigns, jointly and severally, by these presents.

WHEREAS, an order was entered in the above entitled proceeding on the 30th day of March, 1933, allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain order by said United States District Court made on the 27th day of March, 1933, in the above entitled proceeding.

WHEREAS, in said Order allowing said appeal it was required that Appellant give a supersedeas

bond on appeal in the sum of Seven Hundred Fifty Dollars (\$750.00).

WHEREAS, this recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in rule 34 of the said District Court.

NOW, THEREFORE, the condition of this obligation is such that if the above named SOCIETA ITALIANA DI MUTUA BENEFICENZA shall prosecute its appeal to effect and answer all damages if said Appellant fails to make said appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

SOCIETA ITALIANA DI
MUTUA BENEFICENZA
(Principal)

By F. Castagnola, President.
J. Civinini,

Surety.
Domenico Castagnola,
Surety. [30]

State of California
City and County of San Francisco—ss.

J. Civinini and Domenico Castagnola the Sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says:-

That he is a resident and freeholder in the City and County of San Francisco, State of California,

and is worth the sum in the undertaking specified as the principal thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

DOMENICO CASTAGNOLA
J. CIVININI

Subscribed and sworn to before me this 7th day of April, 1933.

[Seal]

JAMES S. MULVEY

Notary Public in and for the City and County of San Francisco, California.

[Endorsed]: Filed Apr. 7, 1933, 2:30 P. M.
Walter B. Maling, Clerk. [31]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of Said Court.

Sir:

Please prepare and certify copies of such papers filed and proceedings had in the above entitled matter as are necessary to a determination of the cause on appeal and in particular as follows:

1. Petition on Order to Show Cause;
2. Answer on Order to Show Cause;
3. Referee's Certificate on Review.
4. Order of District Court affirming Order of Referee;
5. Assignment of Errors;

6. Appeal and Order Allowing Appeal;
7. Citation on Appeal.
8. Statement of the Evidence;
9. Trustee's Exhibit No. 2
10. Respondent's Exhibit "A"
11. This Praecipe;
12. Appellant's Cost Bond.
13. Appellant's Supersedeas Bond.
14. Appellant's Petition for Review of Referee's Order.

Dated: April 26th, 1933.

BACIGALUPI, ELKUS & SALINGER
GEORGE F. BUCK Jr.

Attorneys for Appellant.

[Endorsed] Filed Apr. 26, 1933, 1:51 P. M.

Receipt of copy acknowledged April 25, 1933.

TORREGANO AND STARK
Attorneys for Appellee. [32]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

District Court of the United States
Northern District of California

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true, and correct transcript of the records and

proceedings in the Matter of GIOVANNI B. NAVE, etc., In Bankruptcy, No. 19998-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twelve Dollars and Twenty Cents (\$12.20) and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23rd day of June A. D. 1933.

[Seal]

WALTER B. MALING

Clerk.

by C. M. TAYLOR

Deputy Clerk. [33]

United States of America—ss.

The President of the United States of America
To R. A. Burr, as Trustee in Bankruptcy of
Giovanni B. Nave, a Bankrupt, Appellee,
GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States

District Court for the Northern District of California, Southern Division wherein Societa Italiana di Mutua Beneficenza, a corporation is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank H. Kerrigan, United States District Judge for the Northern District of California this 30th day of March, A. D. 1933.

FRANK H. KERRIGAN,
United States District Judge. [34]

Service of the foregoing citation on this 30th day of March 1933 upon the appellee R. A. Burr as trustee in Bankruptcy of G. B. Nave a bankrupt is hereby admitted.

TORREGANO & STARK,
Attorneys for said Appellee.

[Endorsed]: Filed Mar. 31, 1933, 10:19 A. M.
Walter B. Maling, Clerk.

[Endorsed]: No. 7199. United States Circuit Court of Appeals for the Ninth Circuit. Societa Italiana di Mutua Beneficienza, a Corporation, Appellant, vs. R. A. Burr, as Trustee in bankruptcy of the estate of Giovanni B. Nave, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 23, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.